

BEFORE THE MONTANA STATE AUDITOR
AND COMMISSIONER OF INSURANCE
HELENA, MONTANA

IN THE MATTER OF:)	Case No. 2004-19
)	
INDIVIDUAL SURETY, LTD., an)	
unauthorized insurer, a/k/a)	
INDIVIDUAL SURETY; SHONTO)	FINDINGS OF FACT,
SURETY INC., an unauthorized)	CONCLUSIONS OF LAW,
insurer and successor in)	AND ORDER
interest to INDIVIDUAL SURETY;)	
and ROBERT JOE HANSON, an)	AND NOTICE OF OPPORTUNITY
individual,)	FOR JUDICIAL REVIEW
)	
Respondent.)	

INTRODUCTION

On March 29, 2004, a Notice of Proposed Agency Action and Opportunity for Hearing and Order to Cease and Desist were issued to Respondents Individual Surety, Ltd., Individual Surety, Shonto Surety, Inc., and Robert Joe Hanson alleging violations of the Montana Insurance Code, § 33-1-101, Mont. Code Ann., *et seq.*, specifically that Respondents were acting as unauthorized insurers and unlicensed insurance producers. Subsequently, two Renewed Temporary Orders to Cease and Desist were issued to the Respondents. Respondent Robert Joe

Hanson was served personally on April 8, 2005.¹ Attorney Michael J. Rieley was appointed Hearing Examiner on June 22, 2005. An Amended Notice of Proposed Agency Action and Opportunity for Hearing was issued to the Respondents on July 22, 2005.

Hearing Examiner Rieley held the hearing on October 13, 2005, pursuant to a mailed notice. The hearing was conducted pursuant to the hearings and appeals provisions of the Montana Insurance Code, § 33-1-701, Mont. Code Ann., *et seq.*, the contested case provisions of the Montana Administrative Procedure Act, § 2-4-601, Mont. Code Ann., *et seq.*, and Montana's statutory, public participation in governmental operations notice and hearing provisions, § 2-3-101, Mont. Code Ann., *et seq.*

At the contested case hearing, Don Harris, legal counsel for the Montana State Auditor's Office, represented the Department of Insurance (DOI). None of the Respondents appeared nor did any counsel appear on their behalf. Testimony was received from Julie Gunlock, an investigator for DOI. The following documents were offered by DOI without objection and received into evidence: a copy of "Bid Bond (RBC-0302-BB)," consisting of eight pages (Exhibit A); a copy of "Bid Bond (REC-3909-BB)," consisting of eight pages (Exhibit B); a copy of "Bid Bond (REC-0315-BB)," consisting of six pages (Exhibit C); a copy of a February 8, 2005 fax from Shonto Surety, consisting of one page (Exhibit D).

¹The surety bonds at issue, and affidavits thereto, identify Respondents Hanson, Individual Surety, and Individual Surety, Ltd. and are signed by Respondent Hanson on behalf of Individual Surety and Individual Surety, Ltd. Exhibits A, B and C. Service on Respondents Individual Surety and Individual Surety, Ltd. was effective through service on Respondent Hanson. Respondent Shonto Surety, Inc. is a successor in interest to Individual Surety. See Finding of Fact #14; Trans. at 6; Exhibit D; Conclusion of Law #25. Accordingly, service on Shonto Surety, Inc. was effective through service on Respondents Hanson and Individual Surety.

**HEARING EXAMINER'S PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER
AND EXCEPTIONS FILED BY THE PARTIES**

The Hearing Examiner issued Proposed Findings of Fact, Conclusions of Law and Order on April 12, 2006, and served the parties by mail. The envelopes addressed to the Respondents were returned as undeliverable.

Subsequently, the State Auditor and Commissioner of Insurance (Commissioner) issued a Scheduling Order setting May 19, 2006, as the deadline for the filing of exceptions to the Hearing Examiner's Proposed Findings of Fact, Conclusions of Law and Order with the State Auditor's Office and served Respondents by mail. The envelopes addressed to Respondents Individual Surety and Robert Joe Hanson were returned as undeliverable. The envelope addressed to Respondent Shonto Surety was also returned, but indicated a different mailing address in New Mexico. The Commissioner issued a Revised Scheduling Order setting a deadline of July 7, 2006, for the filing of exceptions to the Hearing Examiner's Proposed Findings of Fact, Conclusions of Law and Order with the State Auditor's Office and served all Respondents at the New Mexico address.

A document entitled Filing of Exceptions and Request for New Hearing/Oral Argument dated July 7, 2006, and signed by Respondent Robert Joe Hanson, apparently on behalf of himself and Respondents Individual Surety, Ltd. and Individual Surety, was received and filed

with the State Auditor's Office on July 10, 2006.² Legal counsel for the DOI filed a Response to Respondents' Exceptions and Request for New Hearing on July 24, 2006.

On August 7, 2006, the Commissioner issued his Scheduling Order for Oral Argument setting September 7, 2006, at 10:30 A.M. at the State Auditor's Office in Helena, Montana, as the time and place to hear the issues raised by the Respondents. Subsequently, the oral argument was continued until October 3, 2006, at 10:30 A.M. pursuant to an Amended Scheduling Order issued on August 18, 2006, by the Commissioner.

At the beginning of the oral argument on October 3, 2006, an attorney named Curtis Lombardi from New Mexico claiming to represent Shonto Surety, Inc. telephoned the State Auditor's Office and was patched into the hearing. Mr. Lombardi confirmed that he was not licensed to practice in Montana and that he had not been admitted to practice *pro hac vice* in Montana. He requested a continuance so that he could be admitted *pro hac vice* to the Montana Bar and represent Shonto Surety, Inc. for an oral argument on the issues raised in Respondent Hanson's exceptions to the Hearing Examiner's Proposed Findings of Fact, Conclusions of Law and Order. The Commissioner continued the oral argument until November 15, 2006, and issued his Second Amended Scheduling Order confirming the date, time and place for oral argument. The order was duly served on all parties on October 11, 2006.

²In his filed exceptions at paragraph # 7, Respondent Hanson states that he "did not sign [the bonds] on behalf of an individual. . . he signed as the Individual Surety . . ." The affidavits of individual surety, part of the bonds, and signed by Respondent Hanson also identify "Individual Surety, Ltd." Exhibits A, B, and C. Further, Respondent Hanson served these exceptions on legal counsel for the DOI and Shonto Surety, Inc. Accordingly, Respondent Hanson appears to be representing himself and Respondents Individual Surety, Ltd. and Individual Surety in filing exceptions.

On November 14, 2006, the State Auditor's Office received a telephone call from Sam S. Painter, an attorney licensed to practice in Montana, asserting that he represented the Respondents. He requested a continuance for the November 15th hearing because of the death of Respondent Hanson's father. The Commissioner issued the Third Amended Scheduling Order for Oral Argument setting the time and place for the hearing as November 29, 2006, at 10:30 A.M. at the State Auditor's Office in Helena, Montana.

The Commissioner convened the oral argument on November 29, 2006, at 10:30 A.M. at the State Auditor's Office. The Commissioner advised that he had received a letter from Sam S. Painter stating that, for a variety of reasons, he would not be representing the Respondents. The Respondents made no appearance at the oral argument either in person or by alternate counsel. Counsel for the DOI moved to accept the Proposed Findings of Fact, Conclusions of Law and Order issued by Hearing Examiner Rieley on April 12, 2006. The motion was taken under advisement by the Commissioner.

**MONTANA LAW, THE MILLER ACT
AND THE FEDERAL ACQUISITION REGULATIONS**

In his filed exceptions, Respondent Hanson, apparently on behalf of himself and Respondents Individual Surety, Ltd. and Individual Surety, asserts that Montana law is preempted by the Miller Act, 40 U.S.C. 3131, *et seq.*, the Federal Acquisition Regulations System and the Federal Acquisition Regulation (FAR), 48 C.F.R. 1.101, *et seq.*, and, therefore, the Commissioner has no jurisdiction. The Commissioner disagrees and instead determines that the surety bonds issued by the Respondents are governed by Montana law and are under the Commissioner's jurisdiction.

The payment bond requirements in the Miller Act provide an alternative to the common law mechanic's lien for suppliers of labor and materials since a lien cannot attach to federal government property. K-W Industries v. National Surety Corp., 855 F.2d 640 (9th Cir. 1988) (citing F.D. Rich Co. v. United States ex rel. Industrial Lumber Co., 417 U.S. 116, 122 (1974)). The Miller Act and the FAR allow insurance companies, contractors, or individuals (natural persons) to act as sureties for general contractors on federal acquisitions. 40 U.S.C. 3132 (the FAR shall provide alternatives to payment bonds as payment protections for suppliers of labor and materials); 48 C.F.R. 1.101 ("The Federal Acquisition Regulations System is established for the codification and publication of uniform policies and procedures for acquisition by all executive agencies. The Federal Acquisition Regulations System consists of the Federal Acquisition Regulation (FAR), which is the primary document, and agency acquisition regulations that implement or supplement the FAR. . ."); 48 C.F.R. 2.101 (a surety is an individual or corporation legally liable for the debt, default, or failure of a principal to satisfy a contractual obligation; an individual surety is one [natural] person, not a business entity); 48 C.F.R. 28.203 (acceptability of individual sureties for certain bonds); 48 C.F.R. 28.204 (contractor may act as surety).

At 48 C.F.R. 2.101, acquisition is defined as "the acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the federal government . . . [and] begins at the point when agency needs are established." Further, executive agencies and federal agencies are defined as an executive department, a military department, a wholly owned government corporation, or any independent establishment in the legislative or judicial branch. 48 C.F.R. 2.101.

The surety bonds issued by the Respondents were bid bonds for sewer and water projects for local government entities in Montana. Exhibits A, B, and C. These construction projects were not acquisitions by the Federal Government under the Miller Act and the FAR in that the contracted services were not being acquired by and for the use of the federal government. 48 C.F.R. 1.101 and 48 C.F.R. 2.101; Marlys Bear Medicine v. U.S., 241 F.3d 1208, 1217 (9th Cir. 2001) (The FAR did not apply to a contract to cut timber on the Blackfeet Indian Reservation because the United States neither purchased nor leased any of the services rendered and the services were not “by and for the use of the Federal Government. The BIA acted as a representative of the seller in the contract, not the purchaser, and any received service benefitted the Blackfeet Tribe rather than the United States, which serves as a trustee of Indian lands.”) Accordingly, these sewer and water construction projects were not acquisitions of the Federal Government. The Miller Act and the FAR, by their express terms, were not intended to and do not apply. Therefore, Montana law is not preempted nor is the Commissioner without jurisdiction in regard to the surety bonds issued by Respondents.³

³Although the Commissioner concludes that the Miller Act and FAR do not apply to the surety bonds at issue, a preemption analysis would still determine that Montana law is not preempted in this matter. A federal law may preempt state law in three ways: (1) the federal law may expressly preempt state law; (2) the federal law may reflect a Congressional intent to occupy the entire legal field in the area; or (3) the state law may conflict with the federal law, either directly in that it is not possible to comply with both, or indirectly in that the state law is an obstacle to accomplishment of the federal objective. K-W Industries v. National Surety Corp., 855 F.2d 640, 642 (1988) (*citations omitted*). The Miller Act does not expressly preempt state law. 40 U.S.C. 3131, *et seq.*; K-W Industries, 855 F.2d at 642. Further, the Miller Act was not intended to occupy the entire legal field of regulating sureties on federal construction projects and Montana law is not an obstacle to the objective of the Miller Act. K-W Industries v. National Surety Corp., 855 F.2d at 642. The Act requires the posting of a bond, does not regulate the conduct of sureties and does not provide that such sureties are unregulated by state law. K-W Industries, 855 F.2d at 642 (Montana law regarding unfair trade practices, Section 33-18-201,

RESPONDENTS' ASSERTION THAT DUE PROCESS WAS DENIED

In his filed exceptions, Respondent Hanson, apparently on behalf of himself and Respondents Individual Surety, Ltd. and Individual Surety, asserts that they were denied due process in this matter. The Commissioner disagrees and determines that Respondents received due process.

Respondent Hanson was personally served on April 8, 2005, with the Notice of Proposed Agency Action and the Cease and Desist Order. The surety bonds at issue, and affidavits thereto, identify Respondents Hanson, Individual Surety, and Individual Surety, Ltd. and are signed by Respondent Hanson on behalf of Individual Surety and Individual Surety, Ltd. Exhibits A, B and C. Service on Respondents Individual Surety and Individual Surety, Ltd. was effective through service on Respondent Hanson. Respondent Shonto Surety, Inc. is a successor in interest to Individual Surety. See Finding of Fact #14; Trans. at 6; Exhibit D; Conclusion of Law #25. Accordingly, service on Shonto Surety, Inc. was effective through service on Respondents Hanson and Individual Surety.

Respondents to this administrative action were accorded proper notice and meaningful opportunity to be heard prior to the entry of these Findings of Fact, Conclusions of Law and Order. As set out above, Respondents failed to make an appearance at the contested case hearing held on October 13, 2005. Following that hearing, the Hearing Examiner mailed the Proposed Findings of Fact, Conclusions of Law and Order to the last known addresses of the Respondents as required by law. Additionally, the Commissioner revised the Scheduling Order giving

Mont. Code Ann., applies to insurance company issuing surety bond on federal construction project).

Respondents additional time to respond with any exceptions to the Hearing Examiner's proposed decision when another address for Respondents was discovered. The Scheduling Order and Hearing Examiner's Proposed Findings of Fact, Conclusions of Law and Order were then served on Respondents at the new address.

The Scheduling Order stated that exceptions to the Proposed Findings, Conclusions of Law and Order must be filed with the Commissioner by July 7, 2006. Even though Respondents failed to file their exceptions by July 7, those exceptions were accepted by the Commissioner and he scheduled oral argument on Respondents' issues pursuant to § 2-4-621, Mont. Code Ann.

Procedural due process requires both notice of a proposed action and some form of hearing that provides a meaningful and timely opportunity to be heard before property is taken. Crismore v. Mont. Board of Outfitters, 327 Mont. 71, 111 P.2d 681 (2005). Respondents were properly given notice and afforded more opportunity to be heard than was required. In fact, oral argument was rescheduled twice even though both requests by Respondents were procedurally flawed. Respondents have been provided their right to due process by the state of Montana. There has been no abuse or unwarranted exercise of discretion. Section 2-4-704(2)(a)(vi), Mont. Code Ann.; Crismore, 327 Mont. at 76, 111 P.2d at 684. The Respondents have received due process and final judgment on the issues is proper.

STANDARD OF REVIEW

In reviewing the Hearing Examiner's proposed decision, the Commissioner is guided by the Montana Administrative Procedure Act (MAPA) regarding contested cases. Section 2-4-621, Mont. Code Ann. Section 2-4-621(3), Mont. Code Ann., of MAPA provides:

The agency may adopt the proposal for decision as the agency's final order. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law. The agency may accept or reduce the recommended penalty in a proposal for decision but may not increase it without a review of the complete record.

As noted in Ulrich v. Board of Funeral Service, 289 Mont. 407, 412, 961 P.2d 126, 129 (1998):

“When conducting a review of the Board’s decision, we note that the Board, which did not personally hear or observe the evidence, does not have the authority to conduct a *de novo* review of the hearing examiner’s decision. Rather, it may reject the examiner’s findings only if they are not based upon competent, substantial evidence. Additionally, the Board must state with particularity that the findings are not based upon competent, substantial evidence. . .” [*omitting partial quote of § 2-4-621, Mont. Code Ann.*]

“A rejection of the hearing examiner’s findings in violation of § 2-4-621(3) Mont. Code Ann., constitutes an abuse of discretion pursuant to § 2-4-704(2)(a)(vi). [*omitting citation*]”

In interpreting MAPA, however, the Montana Supreme Court has held that a hearing examiner’s findings of fact may be modified or rejected in other circumstances. In the Matter of the Grievance of Brady, 295 Mont. 75, 983 P.2d 292 (1998). The Commissioner may determine that certain of the Hearing Examiner’s findings of fact have no substantive value in determining the legal issues in this matter and, therefore, may reject those findings as immaterial. Brady, 295 Mont. at 79-80, 983 P.2d at 295. Additionally, the Commissioner may determine that certain of the Hearing Examiner’s findings of fact are based on an interpretation of law and, therefore, such findings of fact may be rejected or modified like conclusions of law by the Commissioner. Brady, 295 Mont. at 79-80, 983 P.2d at 295.

With regard to the Hearing Examiner's conclusions of law interpreting and applying the Montana Insurance Code, 33-1-101, Mont. Code Ann., *et seq.*, the Commissioner may determine that the Hearing Examiner misinterpreted the law and may modify or reject the Hearing Examiner's proposed Conclusions of Law. Brady, 295 Mont. at 83, 983 P.2d at 297; Steer, Inc. v. Department of Revenue, 245 Mont. 470, 474, 803 P.2d 601, 603 (1990). Further, the Commissioner may accept or reduce the recommended penalty in the Hearing Examiner's proposed decision but may not increase it without a review of the complete record. Section 2-4-621(3), Mont. Code Ann.

Having reviewed the complete record in these proceedings, the State Auditor and Commissioner of Insurance hereby adopts the Hearing Examiner's Proposed Findings of Fact, Conclusions of Law, and Order in part, and alters and amends other pertinent parts as follows:

FINDINGS OF FACT

1. DOI insurance investigator Julie Gunlock (Gunlock) was assigned to investigate a bid and performance bond regarding Robert Joe Hanson (Hanson), Individual Surety (Individual Surety), a.k.a Individual Surety, Ltd., and Shonto Surety (Shonto), the three respondents in this matter. From her investigation, Gunlock discovered that neither Hanson nor any of his associates were licensed by DOI to sell insurance products in Montana. Gunlock also discovered that none of these entities was registered as a business entity or assumed business name with the Montana Secretary of State so as to be authorized to transact business in this State.⁴ (Trans. at 1-2 and 6.)

⁴Respondents filed an exception to the Hearing Examiner's proposed Finding of Fact #1 alleging that there was no evidence of performance bonds in the record. Ms. Gunlock testified that the inquiry was in regard to bid and performance bonds issued by the Respondents. Trans. 1-2. The Exhibits admitted at the hearing were bid bonds. Exhibits A., B, and C. Upon

2. Bid Bond RBC-0302-BB was issued by Individual Surety of 6402 McLeod Dr. #5, Las Vegas, Nevada, 89120, on behalf of Ro-Bec Construction, LLC, of Butte, Montana, as Bidder, for a construction project described on the bond as "Installation of 5,000 ft. of 8" PVC Watermain" for Ashland County Water and Sewer District, Ashland, Montana, as Owner, in the amount of \$185,000.00 (Ashland Bond). Exhibit A. The Ashland Bond is signed by Hanson on behalf of Individual Surety and contains a "Bid Due Date" of March 10, 2004. Attached to the Ashland Bond is Hanson's "Affidavit of Individual Surety" which is signed by Hanson, identifies "Individual Surety, Ltd." as Hanson's employer, and is dated March 3, 2004. Exhibit A. Under the Ashland Bond, the surety, its heirs, executors, administrators, successors, and assigns agreed to be bound to pay to the Ashland County Water and Sewer District a sum of up to \$185,000.00 in the event of a default by Bidder.⁵ Exhibit A.

3. Bid Bond REC-0309-BB was issued by Individual Surety of 6402 McLeod Dr. #5, Las Vegas, Nevada, 89120, on behalf of Ro-Bec Construction, LLC, of Butte, Montana, as

reviewing the complete record, the Commissioner finds that this proposed finding of fact is based on competent, substantial evidence and adopts the same.

⁵Respondents filed an exception to the Hearing Examiner's proposed Findings of Fact #2, #3, and #4 alleging that Respondent Hanson signed the bonds as required by the FAR and that the referenced Exhibits A, B, and C (the bonds) were not mailed to them. As explained previously, the Commissioner determined that the FAR does not apply to the bonds at issue. The referenced exhibits were introduced at the hearing which Respondents did not attend. However, these are the same exhibits that were attached to the Notice of Proposed Agency Action which was served on Respondents and, from the description in the proposed Findings of Fact, the identity of the exhibits should be readily apparent to Respondents.

Upon reviewing the complete record, the Commissioner finds that there is competent substantial evidence to support the Hearing Examiner's proposed factual determinations. For clarity, however, the Commissioner modified Findings of Fact #2, #3, and #4 by adding that the Affidavit of Individual Surety was signed by Respondent Hanson and identifies Individual Surety, Ltd. as his employer.

Bidder, for a construction project described on the bond as “Construction of new wastewater treatment ponds and associated treatment works” for Green Meadow Water District, Malta, Montana, as Owner, in the amount of \$13,900.00 (Green Meadow Bond). Exhibit B. The Green Meadow Bond is signed by Hanson on behalf of Individual Surety and contains a “Bid Due Date” of March 10, 2004. Attached to the Green Meadow Bond is Hanson’s “Affidavit of Individual Surety” which is signed by Hanson, identifies “Individual Surety, Ltd.” as Hanson’s employer, and is dated March 9, 2004. Exhibit B. Under the Green Meadow Bond, the surety, its heirs, executors, administrators, successors, and assigns agreed to be bound to pay to the Green Meadow Water District a sum of up to \$13,900.00 in the event of a default by Bidder.⁶ Exhibit B.

4. Bid Bond RBC-0315-BB was issued by Individual Surety of 6402 McLeod Dr. #5, Las Vegas, Nevada, 89120, on behalf of Ro-Bec Construction, LLC, of Butte, Montana, as Bidder, for a construction project described on the bond as “Extension of water and sewer mains, reconstruction of local streets, and replacement of an existing wastewater lift station in Bridger Center Subdivision, S.I.D. #674” for the City of Bozeman, Montana, as Owner, in the amount of \$43,000.00 (Bozeman Bond). Exhibit C. The Bozeman Bond is signed by Hanson on behalf of Individual Surety and contains a “Bid Due Date” of March 16, 2004. Attached to the Bozeman Bond is Hanson’s “Affidavit of Individual Surety” which is signed by Hanson, identifies “Individual Surety, Ltd.” as Hanson’s employer, and is dated March 15, 2004. Exhibit C. Under the Bozeman Bond, the surety, its heirs, executors, administrators, successors, and assigns agreed

⁶See Footnote #4.

to be bound to pay to the City of Bozeman a sum of up to \$43,000.00 in the event of a default by Bidder.⁷ Exhibit C.

5. A bid bond guarantees that the bidding package of a bidder is correct, accurate and complies with the law.⁸ Trans. at 2.

⁷See Footnote #4.

⁸Although neither Respondents nor the DOI filed an exception to the Hearing Examiner's proposed Finding of Fact #5, the Commissioner finds that this proposed Finding of Fact is based on an interpretation of law regarding whether the Miller Act and the FAR apply to the construction projects for which Respondents issued the bonds. See the foregoing discussion regarding Montana Law, the Miller Act, and the Federal Acquisition Regulations. A finding of fact that includes an interpretation of law or is based on a legal interpretation may be rejected or modified like a conclusion of law by the Commissioner. *Brady*, 295 Mont. at 79-80, 983 P.2d at 295.

In oral argument, legal counsel for the DOI stated that the preemption issue was the subject of a declaratory judgment action, *Hanson v. Morrison et al*, Case No. CV-05-26-H-CSO, in U.S. District Court for the District of Montana, which was ultimately dismissed for failure to prosecute. Legal counsel further indicated that the preemption issue had been extensively briefed in the declaratory judgment action which could benefit the Commissioner in his review of the instant case. Respondent's Preliminary Pretrial Statement in the declaratory judgment action states that these same construction projects were at least partially funded by appropriations from the federal government and that the Miller Act and the FAR apply. These statements are erroneous. There is no evidence in the record, in either *Hanson v. Morrison et al* or the instant case, that these construction projects were partially funded by the federal government. Further, the Miller Act and the FAR only apply to acquisitions by and for the use of the federal government. See the previous discussion regarding Montana Law, the Miller Act, and the Federal Acquisition Regulations. These construction projects were undertaken by and for the use of local government entities.

Moreover, these statements are not judicial admissions of fact and do not bind the Commissioner and DOI. *Conagra v. Nierenberg*, 301 Mont. 55, 7 P.3d 369 (2000). A judicial admission is a statement of fact, not a conclusion of law or expression of opinion. *Conagra*, 301 Mont. at 69, 7 P.3d at 379 (citing *DeMars v. Carlstrom*, 285 Mont. 334, 337-38, 948 P.2d 246, 248-49 (1997)). The difference between fact and law is explained as:

A 'fact' as distinguished from the 'law,' may be taken as that out of which the point of law arises, that which is asserted to be or not to be, and is to be presumed or proved to be and not to be for the purpose of applying or refusing to apply a rule of law. Law is principle; fact is event.

DeMars v. Carlstrom, 285 Mont. 334, 338, 948 P.2d 246, 249 (1997) (quoting Black's Law

6. Each of the Bid Bonds contains the following statement: "This bond is a guarantee, it is not an insurance product or policy."⁹ Exhibits A, B, and C; Trans. at 6.

7. Attached to each bond is an "Affidavit of Individual Surety" (Affidavit) with the following printed designation in the lower right corner of the document.

Standard, Form 28 Affidavit (Rev. 8-96)
Prescribed by GSA-FAR (48 CFR) 53.228(e)

The following appears in paragraph 7 of each Affidavit:

THE FOLLOWING IS A TRUE REPRESENTATION OF THE ASSETS I HAVE
PLEDGED TO THE UNITED STATES IN SUPPORT OF THE ATTACHED BOND:

(a) Real estate
N/A

(b) Assets other than real estate (*describe the assets, the details of the escrow account, and attach certified evidence thereof*).

N/A Underwriters Reinsurance Company, LTD,-----\$985,240,000.00
Financial Corporate Reinsurance Debenture #2003-00601----\$ 20,000,000.00¹⁰

Dictionary 592 (6th ed. 1990). Accordingly, the conclusion of law that the Miller Act and the FAR apply is not a judicial admission of fact and does not bind the Commissioner and DOI.

Based on the foregoing, the Commissioner finds that the Hearing Examiner's proposed Finding of Fact #5 is a statement of an erroneous conclusion of law and, therefore, removes the same and renumbers the remaining Findings of Fact.

Respondents filed an exception to the Hearing Examiner's proposed Finding of Fact #6, renumbered here as Finding of Fact #5, alleging that it was an inaccurate statement of fact and legally incorrect. Upon reviewing the complete record, the Commissioner finds that this proposed finding is based on competent substantial evidence and adopts the same.

⁹Respondents filed an exception to the Hearing Examiner's proposed Findings of Fact #7 and #8, renumbered here as Findings of Fact #6 and #7, alleging that the exhibits referenced were not provided to them. The referenced exhibits were introduced at the hearing which Respondents did not attend. However, these are the same exhibits that were attached to the Notice of Proposed Agency Action which was served on Respondents and, from the description in these and other Findings of Fact, the identity of the exhibits should be readily apparent to Respondents. Upon reviewing the complete record, the Commissioner finds that these proposed findings are based on competent substantial evidence and adopts the same.

¹⁰See previous footnote.

8. The purpose of an affidavit accompanying a bid bond is to identify legitimate, valid assets to secure the bond.¹¹ Trans. at 5.

9. Each bond package also contained:

(a) A Corporate Reinsurance Debenture #2003-00601 written by Underwriters Reinsurance Company, LTD., and signed by Dr. Larry J. Wright, Managing Director/CEO on October 24, 2003 (Debenture). Each Debenture states in pertinent part:

Underwriters Reinsurance Company Ltd. Hereinafter called "Guarantor", is pledging an aggregate of Twenty Million and no/one-hundredths United States Dollars (\$20,000,000.00 USD) in the form of Corporate Reinsurance Debenture Number #2003-00601, to back Robert Joe Hanson, of 6402 McLeod Dr., Suite 5, Las Vegas, NV 89120, hereinafter called "Principal".

(b) A Certified Copy of the June 30, 2003, Balance Sheet of Underwriters Reinsurance Company, Ltd. (URCL) (Balance Sheet). According to this Balance Sheet, URCL had assets in

¹¹Respondents filed an exception to the Hearing Examiner's proposed Finding of Fact #9, renumbered here as Finding of Fact #8, alleging that the FAR applied to the bonds at issue and challenging Ms. Gunlock's competency as an expert witness. The Commissioner finds that this proposed Finding of Fact regarding applicability of the FAR to the bonds at issue is not based on competent, substantial evidence, is immaterial, and is based on an interpretation of law. As discussed previously, the FAR does not apply to the bonds at issue. See the foregoing discussion regarding Montana Law, the Miller Act, and the Federal Acquisition Regulations.

Respondents failed to attend the hearing and challenge Ms. Gunlock as a witness at that time and are now precluded from raising the issue. Barrett v. ASARCO, Inc., 245 Mont. 196, 206, 799 P.2d 1078, 1083 (1990). Further, Ms. Gunlock was not offered or admitted as an expert witness. She properly testified as a lay witness regarding her opinions and inferences that were rationally based on her perceptions. State v. Henderson, 330 Mont. 34, 125 P.2d 1132 (2005) (under Mont. R. Evid. 701, a firefighter may testify as a lay witness regarding his opinions and inferences about the points of origin of a fire, areas that appeared more burned than others, pour patterns, and indications of arson that were rationally based on his perceptions).

Accordingly, the Commissioner has modified this Finding of Fact to remove the legal interpretation and immaterial information. Brady, 295 Mont. at 79-80, 983 P.2d at 295.

the following numerical amounts: "Cash and Cash Equivalents: 500,240,000; Cash Equivalents (Gold and Precious Metals): 500,000,000."¹² Exhibits A, B, and C.

10. There is an "Underwriters Reinsurance Company," but no URCL.¹³ Trans. at 8.

11. Statements in each of the Montana Bid Bonds give the impression that the bonds agreed to by Hanson and Individual Surety were not insurance products or policies. These statements are untrue, deceptive, and/or misleading.¹⁴

12. The statements contained in each of the affidavits constitute misrepresentations of the nature and ownership of the assets. By offering these Bid Bonds and Affidavits to the

¹²Respondents filed an exception to the Hearing Examiner's proposed Finding of Fact #10, renumbered here as Finding of Fact #9, alleging that the exhibits referenced were not provided to them. The referenced exhibits were introduced at the hearing which Respondents did not attend. However, these same exhibits were attached to the Notice of Proposed Agency Action which was served on Respondents and, from the description in these and other Findings of Fact, the identity of the exhibits should be readily apparent to Respondents. Upon reviewing the complete record, the Commissioner finds that this proposed finding of fact is based on competent substantial evidence and adopts the same.

¹³Respondents filed an exception to the Hearing Examiner's Finding of Fact #11, renumbered here as Finding of Fact #10, alleging that the Underwriters Reinsurance Company and URCL are the same entity. Respondents failed to attend the hearing and did not present any evidence on this or any other matter. Accordingly, the Commissioner finds there is competent, substantial evidence to support the finding that Underwriters Reinsurance Company and URCL are not the same entity. The remainder of the proposed finding of fact is immaterial and is based on an interpretation of law. As discussed previously, the FAR does not apply to the bonds at issue. See the foregoing discussion regarding Montana Law, the Miller Act, and the Federal Acquisition Regulations. Accordingly, the Commissioner has modified this Finding of Fact to remove the legal interpretation and immaterial information. Brady, 295 Mont. at 79-80, 983 P.2d at 295.

¹⁴Respondents filed an exception to the Hearing Examiner's Finding of Fact #12, renumbered here as Finding of Fact #11, alleging that the FAR applies and bonds under the FAR are not insurance. As discussed previously, the FAR does not apply to the bonds at issue. See the foregoing discussion regarding Montana Law, the Miller Act, and the Federal Acquisition Regulations. Upon reviewing the complete record, the Commissioner finds that this proposed finding of fact is based on competent, substantial evidence and adopts the same.

Bidder, Hanson and Individual Surety misled Bidder and the Project Managers for each of the three projects.¹⁵

13. Hanson and Individual Surety negotiated each of the Bonds with the Bidder and solicited four other companies in Montana to use their bonds. Trans. at 6 and 2-3; Exhibits A, B, and C. Each of the bonds was submitted to the respective contracting entities and used for the purpose of securing the Bidder's attempt to be awarded the respective project.¹⁶ Trans. at 2-4.

14. On or about February 8, 2005, Individual Surety evolved into Shonto Surety (Shonto) and took over Individual Surety's business operations. Trans. at 6; Exhibit D. On February 8, 2005, Shonto Surety sent a facsimile transmission to contractors who had done business with or been approached by Individual Surety in the past. The facsimile was sent from the same

¹⁵Respondents filed an exception to the Hearing Examiner's Finding of Fact #13, renumbered here as Finding of Fact #12, alleging that it is not supported by the record and that the contracting officer has sole discretion to determine whether the assets are sufficient under the FAR. Respondents failed to attend the hearing and did not present any evidence on this or any other matter. Accordingly, the Commissioner finds there is competent, substantial evidence to support the finding that the affidavits misrepresented the nature and ownership of the assets and were misleading. The remainder of the proposed finding of fact is immaterial and is based on an interpretation of law. As discussed previously, the FAR does not apply to the bonds at issue. See the foregoing discussion regarding Montana Law, the Miller Act, and the Federal Acquisition Regulations. Accordingly, the Commissioner has modified this Finding of Fact to remove the legal interpretation and immaterial information. Brady, 295 Mont. at 79-80, 983 P.2d at 295.

¹⁶Respondents filed an exception to the Hearing Examiner's Finding of Fact #14, renumbered here as Finding of Fact #13, alleging that exhibits referenced were not provided to them and additional evidence would disprove the finding. The referenced exhibits were introduced at the hearing which Respondents did not attend. However, these same exhibits were attached to the Notice of Proposed Agency Action which was served on Respondents and, from the description in these and other Findings of Fact, the identity of the exhibits should be readily apparent to Respondents. Upon reviewing the complete record, the Commissioner finds that this proposed finding of fact is based on competent substantial evidence and adopts the same.

telephone number that previous transmissions from Individual Surety had been sent from. The fax states:

Dear Contractor

Please take note (sic) of the recent change of address and phone #'s

As of February 8th, 2005 our new contact information is as follows:

Individual Surety
2135 Highway 95 Suite #241
Bull Head City, Arizona 86422

Phone #: 1-928-704-4244
Fax # 1-918-704-4271

Thank you in advance for the inconvenience.

Sincerely:
The Staff of Shonto Surety, Inc.¹⁷

Exhibit D; Trans. at 6.

15. Shonto Surety has marketed its services as a surety and solicited business in Montana by telephone.¹⁸ Trans. at 6; Exhibit D.

¹⁷Respondents filed an exception to the Hearing Examiner's Finding of Fact #15, renumbered here as Finding of Fact #14, alleging that it is a misstatement and erroneous. Respondents failed to attend the hearing and did not present any evidence on this or any other matter. Although the record is not clear, the Commissioner defers to the Hearing Examiner's factual determinations in regard to the relationship between Individual Surety and Shonto Surety. Although conflicts may exist in the evidence presented, it is the duty and function of the Hearing Examiner to resolve such conflicts and his findings will not be disturbed when based on substantial though conflicting evidence. Matos v. Rohrer, 203 Mont. 162, 169, 661 P.2d 443, 447 (1983); Price Building Service, Inc. v. Christensen, 215 Mont. 372, 378, 697 P.2d 1344, 1348 (1985) (a trial judge's findings of fact in a nonjury civil action are not to be disturbed unless clearly erroneous). Upon reviewing the complete record, the Commissioner finds that this proposed finding of fact is based on competent substantial evidence and adopts the same.

¹⁸Respondents filed an exception to the Hearing Examiner's Finding of Fact #16, renumbered here as Finding of Fact #15, alleging that it is a misstatement and erroneous.

16. Hanson failed to disclose to Bidder that he did not have a certificate of authority to solicit or transact insurance in the State of Montana in connection with the Ashland, Green Meadow, and Bozeman bonds.¹⁹

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Commissioner hereby makes the following Conclusions of Law:²⁰

1. The Commissioner and DOI have jurisdiction over this matter. Section 33-1-311, Mont. Code Ann.

2. Pursuant to § 33-1-102(1), Mont. Code Ann., a person or entity may not transact a business of insurance in Montana or a business relative to a subject resident, located or to be performed in Montana without complying with the Montana Insurance Code, § 33-1-101, *et seq.*, Mont. Code Ann.

Respondents failed to attend the hearing and did not present any evidence on this or any other matter. Upon reviewing the complete record, the Commissioner finds that this proposed finding of fact is based on competent substantial evidence and adopts the same.

¹⁹Respondents filed an exception to the Hearing Examiner's Finding of Fact #17, renumbered here as Finding of Fact #16, alleging that the FAR applies to the bonds at issue and under the FAR a certificate of authority is not necessary. As discussed previously, the FAR is not applicable. See the foregoing discussion regarding Montana Law, the Miller Act, and the Federal Acquisition Regulations. Upon reviewing the complete record, the Commissioner finds that this proposed finding of fact is based on competent substantial evidence and adopts the same.

²⁰Respondents filed an exception to all of the Hearing Examiner's proposed Conclusions of Law alleging that Montana law is preempted by the Miller Act and the FAR. As discussed previously, the Miller Act and the FAR are not applicable. See the foregoing discussion regarding Montana Law, the Miller Act, and the Federal Acquisition Regulations. Accordingly, the Commissioner will not address each paragraph in the Conclusions of Law separately. However, any modifications to the Hearing Examiner's proposed Conclusions of Law by the Commissioner will be noted and explained.

3. Pursuant to § 33-1-201(5)(a), Mont. Code Ann., “[i]nsurance is a contract whereby one undertakes to indemnify another or pay or provide a specified or determinable amount or benefit upon determinable contingencies ”

4. Pursuant to § 33-1-201(6), Mont. Code Ann., “every person engaged as an indemnitor, surety, or contractor in the business of entering contracts of insurance” is an “[i]nsurer.”

5. Pursuant to § 33-1-211, Mont. Code Ann., “[s]urety insurance includes: . . . insurance guaranteeing the performance of contracts, other than insurance policies, and guaranteeing and executing bonds, undertakings, and contracts of suretyship.”

6. Pursuant to § 33-2-101, Mont. Code Ann., “[n]o person shall act as an insurer and no insurer shall transact insurance in [Montana] except as authorized by a subsisting certificate of authority issued to it by the commissioner.”

7. Pursuant to § 33-17-201, Mont. Code Ann., “[a] person may not sell, solicit, or negotiate insurance or act as an insurance producer in this state unless licensed as an insurance producer.”

8. Pursuant to § 33-18-203, Mont. Code Ann., “[n]o person shall make, publish, disseminate, circulate, or place before the public, . . . an advertisement, announcement, or statement containing any assertion, representation, or statement with respect to the business of insurance or with respect to any person in the conduct of his insurance business, which is untrue, deceptive, or misleading.”²¹

²¹The Commissioner determines that the Hearing Examiner misinterpreted and misapplied the law to the established facts in his proposed Conclusion of Law #9 (that Respondent Hanson's agreement to pay the amount of the surety bonds in the event of default by

9. Individual Surety's agreements to pay amounts specified in the Montana Bid Bonds in the event of a default by Bidder constitute contracts to pay determinable amounts on determinable contingencies. These agreements are insurance pursuant to § 33-1-201(5)(a), Mont. Code Ann.²²

10. Individual Surety acted as an insurer by engaging as a surety in the business of entering contracts of insurance when it entered into the Montana Bid Bonds. Section 33-1-201(6), Mont. Code Ann.²³

the bidder constitutes insurance). Individuals (natural persons) may act as sureties without being an authorized insurer. Section 33-26-102, Mont. Code Ann. (individual surety qualifications). However, the surety bonds and included affidavits at issue identified business entities "Individual Surety" and/or "Individual Surety, Ltd." as the surety. Exhibits A, B, and C. Accordingly, the Commissioner rejects this proposed Conclusion of Law and renumbers the remaining Conclusions of Law. Section 2-4-621(3), Mont. Code Ann. ; Brady, 295 Mont. at 83, 983 P.2d at 297; Steer, Inc., 245 Mont. at 474, 803 P.2d at 603.

²²The Commissioner determines that the Hearing Examiner misinterpreted and misapplied the law to the established facts in his proposed Conclusion of Law #11 (that Respondent Hanson acted as an insurer in issuing the surety bonds). Individuals (natural persons) may act as sureties without being an authorized insurer. Section 33-26-102, Mont. Code Ann. (individual surety qualifications). However, the surety bonds and included affidavits at issue identified business entities "Individual Surety" and/or "Individual Surety, Ltd." as the surety. Exhibits A, B, and C. Accordingly, the Commissioner rejects this proposed Conclusion of Law and renumbers the remaining Conclusions of Law. Section 2-4-621(3), Mont. Code Ann.; Brady, 295 Mont. at 83, 983 P.2d at 297; Steer, Inc., 245 Mont. at 474, 803 P.2d at 603.

²³The Commissioner determines that the Hearing Examiner misinterpreted and misapplied the law to the established facts in his proposed Conclusion of Law #13 (that Respondent Hanson acted as an insurer in issuing the bonds). Individuals (natural persons) may act as sureties without being an authorized insurer. Section 33-26-102, Mont. Code Ann. (individual surety qualifications). However, the surety bonds and included affidavits at issue identified business entities "Individual Surety" and/or "Individual Surety, Ltd." as the surety. Exhibits A, B, and C. Accordingly, the Commissioner rejects this proposed Conclusion of Law and renumbers the remaining Conclusions of Law. Section 2-4-621(3), Mont. Code Ann. ; Brady, 295 Mont. at 83, 983 P.2d at 297; Steer, Inc., 245 Mont. at 474, 803 P.2d at 603.

11. Individual Surety engaged in the business of surety insurance by guaranteeing the performance of contracts and guaranteeing and executing bonds, undertakings, and contracts of suretyship when it entered into the Montana Bid Bonds. Section 33-1-211, Mont. Code Ann.²⁴

12. Individual Surety's above-described actions constitute violations of § 33-2-101, Mont. Code Ann., which prohibits a person from acting as an insurer or transacting insurance in Montana without a valid Certificate of Authority issued by the Commissioner.

13. By marketing its services to contractors in Montana, Shonto Surety has transacted insurance business in Montana without a valid certificate of authority in violation of § 33-2-101, Mont. Code Ann.

14. Hanson acted as an insurance producer in Montana by soliciting, negotiating, and selling insurance, i.e. the Montana Bid Bonds, to Bidder, a Montana company, covering work to be performed in Montana, and thereby is in violation of § 33-17-201, Mont. Code Ann.

15. Hanson violated § 33-2-104, Mont. Code Ann. by acting as an insurance producer for, and otherwise representing, Individual Surety, an insurer not authorized to transact insurance

²⁴The Commissioner determines that the Hearing Examiner misinterpreted and misapplied the law to the established facts in his proposed Conclusion of Law #15 (that Respondent Hanson acted as an unauthorized insurer in violation of § 33-2-101, Mont. Code Ann. in issuing the bonds). Individuals (natural persons) may act as sureties without being an authorized insurer. Section 33-26-102, Mont. Code Ann.(individual surety qualifications). However, the surety bonds and included affidavits at issue identified business entities "Individual Surety" and/or "Individual Surety, Ltd." as the surety. Exhibits A, B, and C. Accordingly, the Commissioner rejects this proposed Conclusion of Law and renumbers the remaining Conclusions of Law. Section 2-4-621(3), Mont. Code Ann.; Brady, 295 Mont. at 83, 983 P.2d at 297; Steer, Inc., 245 Mont. at 474, 803 P.2d at 603.

business in the State of Montana with respect to the afore-described insurance transactions located or to be performed in Montana.²⁵

16. Each Bid Bond contains the following statement: "This bond is a guarantee, it is not an insurance product or policy." This also is an untrue, deceptive, and/or misleading statement.

17. Hanson violated § 33-18-202(1), Mont. Code Ann. by disseminating the Affidavits to Bidder and the contracting officers involved in the Ashland, Green Meadow, and Bozeman projects for the purpose of inducing the contracting officers to accept Individual Surety and/or Individual Surety, Ltd. as surety. In addition to having contained statements that are untrue, deceptive, and/or misleading, the Affidavits also contained statements which misrepresented the nature and ownership of the assets listed.²⁶

²⁵The Commissioner determines that the Hearing Examiner misinterpreted and misapplied the law to the established facts in his proposed Conclusion of Law #20 (that the construction projects were acquisitions of the federal government and the surety bonds at issue were subject to the Miller Act and the FAR). As discussed previously, the Miller Act and the FAR are not applicable. See the foregoing discussion regarding Montana Law, the Miller Act, and the Federal Acquisition Regulations. Accordingly, the Commissioner rejects this proposed Conclusion of Law and rennumbers the remaining Conclusions of Law. Section 2-4-621(3), Mont. Code Ann.; Brady, 295 Mont. at 83, 983 P.2d at 297; Steer, Inc., 245 Mont. at 474, 803 P.2d at 603.

²⁶The Commissioner determines that the Hearing Examiner misinterpreted and misapplied the law to the established facts in his proposed Conclusion of Law #22 (that Hanson was the surety and that the FAR was applicable), renumbered here as Conclusion of Law #17. As discussed previously, the surety bonds identify business entities Individual Surety and/or Individual Surety, Ltd. as the surety. Exhibit A., B, and C; see Footnote #21. Further, the Miller Act and the FAR are not applicable. See the foregoing discussion regarding Montana Law, the Miller Act, and the Federal Acquisition Regulations. Accordingly, the Commissioner modifies this Conclusion of Law to remove the misinterpretation and misapplication of law. Section 2-4-621(3), Mont. Code Ann.; Brady, 295 Mont. at 83, 983 P.2d at 297; Steer, Inc., 245 Mont. at 474, 803 P.2d at 603.

18. Individual Surety violated § 33-18-202(1), Mont. Code Ann. by disseminating the Affidavits to Bidder and the contracting officers involved in the Ashland, Green Meadow, and Bozeman projects for the purpose of inducing the contracting officers to accept Individual Surety and/or Individual Surety, Ltd. as surety. In addition to having contained statements that are untrue, deceptive, and/or misleading, the Affidavits also contained statements which misrepresented the nature and ownership of the assets listed.²⁷

19. Hanson violated § 33-18-202(4), Mont. Code Ann., by disseminating Affidavits to Bidder and the contracting officers involved in the Ashland, Green Meadow, and Bozeman projects, which contained not only statements that are untrue, deceptive, and/or misleading, but also contained misrepresentations as to the financial condition of Individual Surety, Individual Surety, Ltd., and URCL.²⁸

²⁷The Commissioner determines that the Hearing Examiner misinterpreted and misapplied the law to the established facts in his proposed Conclusion of Law #23 (that Hanson was the surety and that the FAR was applicable), renumbered here as Conclusion of Law #18. As discussed previously, the surety bonds identify business entities Individual Surety and/or Individual Surety, Ltd. as the surety. Exhibit A, B, and C; see Footnote #21. Further, the Miller Act and the FAR are not applicable. See the foregoing discussion regarding Montana Law, the Miller Act, and the Federal Acquisition Regulations. Accordingly, the Commissioner modifies this Conclusion of Law to remove the misinterpretation and misapplication of law. Section 2-4-621(3), Mont. Code Ann.; Brady, 295 Mont. at 83, 983 P.2d at 297; Steer, Inc., 245 Mont. at 474, 803 P.2d at 603.

²⁸The Commissioner modified the Hearing Examiner's proposed Conclusion of Law #24, renumbered here as Conclusion of Law #19, by removing the reference to Hanson. As discussed previously, the surety bonds identify business entities Individual Surety and/or Individual Surety, Ltd. as the surety. Exhibit A, B, and C; see Footnote #21. The Commissioner may modify proposed Conclusions of Law that misinterpret or misapply the law to the established facts. Section 2-4-621(3), Mont. Code Ann.; Brady, 295 Mont. at 83, 983 P.2d at 297; Steer, Inc., 245 Mont. at 474, 803 P.2d at 603.

20. Individual Surety violated § 33-18-202(4), Mont. Code Ann. by disseminating Affidavits to Bidders and the contracting officers involved in the Ashland, Green Meadow, and Bozeman projects, which contained not only statements that are untrue, deceptive, and/or misleading, but also contained misrepresentations as to the financial condition of Individual Surety, Individual Surety, Ltd., and URCL.²⁹

21. Statements in each of the Montana Bid Bonds give the impression that the bonds agreed to by Hanson on behalf of Individual Surety were not insurance products or policies. These statements are untrue, deceptive, and/or misleading. As a result, Hanson violated § 33-18-203, Mont. Code Ann. by disseminating statements or otherwise causing dissemination of statements in regard to the business of insurance.³⁰

22. Statements in each of the Montana Bid Bonds give the impression that the bonds agreed to by Hanson on behalf of Individual Surety were not insurance products or policies. These statements are untrue, deceptive, and/or misleading. As a result, Individual Surety

²⁹The Commissioner modified the Hearing Examiner's proposed Conclusion of Law #25, renumbered here as Conclusion of Law #20, by removing the reference to Hanson. As discussed previously, the surety bonds identify business entities Individual Surety and/or Individual Surety, Ltd. as the surety. Exhibit A, B, and C; see Footnote #21. The Commissioner may modify proposed Conclusions of Law that misinterpret or misapply the law to the established facts. Section 2-4-621(3), Mont. Code Ann.; Brady, 295 Mont. at 83, 983 P.2d at 297; Steer, Inc., 245 Mont. at 474, 803 P.2d at 603.

³⁰The Commissioner modified the Hearing Examiner's proposed Conclusion of Law #26, renumbered here as Conclusion of Law #21, by clarifying that the bonds were agreed to by Hanson on behalf of Individual Surety. As discussed previously, the surety bonds identify business entities Individual Surety and/or Individual Surety, Ltd. as the surety. Exhibit A, B, and C; see Footnote #21. The Commissioner may modify proposed Conclusions of Law that misinterpret or misapply the law to the established facts. Section 2-4-621(3), Mont. Code Ann.; Brady, 295 Mont. at 83, 983 P.2d at 297; Steer, Inc., 245 Mont. at 474, 803 P.2d at 603.

violated § 33-18-203, Mont. Code Ann. by disseminating statements or otherwise causing dissemination of statements in regard to the business of insurance.³¹

23. Hanson violated § 33-18-205(1), Mont. Code Ann. by disseminating Affidavits, Debentures, and Balance Sheets as part of the Bid Bonds for the Ashland, Green Meadow, and Bozeman projects which contained false statements of the financial condition of Individual Surety, Individual Surety, Ltd., and URCL, for the purpose of deceiving Bidders and the contracting officers of the respective projects.³²

24. Individual Surety violated § 33-18-205(1), Mont. Code Ann. by disseminating Affidavits, Debentures, and Balance Sheets as part of the Bid Bonds for the Ashland, Green Meadow, and Bozeman projects which contained false statements of the financial condition of Individual Surety, Individual Surety, Ltd., and URCL, for the purpose of deceiving Bidders and the contracting officers of the respective projects.³³

³¹The Commissioner modified the Hearing Examiner's proposed Conclusion of Law #27, renumbered here as Conclusion of Law #22, by clarifying that the bonds were agreed to by Hanson on behalf of Individual Surety. As discussed previously, the surety bonds identify business entities Individual Surety and/or Individual Surety, Ltd. as the surety. Exhibit A, B, and C; see Footnote #21. The Commissioner may modify proposed Conclusions of Law that misinterpret or misapply the law to the established facts. Section 2-4-621(3), Mont. Code Ann.; Brady, 295 Mont. at 83, 983 P.2d at 297; Steer, Inc. v. Dept. of Revenue, 245 Mont. 470, 474, 803 P.2d 601, 603 (1990).

³²The Commissioner modified the Hearing Examiner's proposed Conclusion of Law #28, renumbered here as Conclusion of Law #23, by removing the reference to Hanson's financial condition. As discussed previously, the surety bonds identify business entities Individual Surety and/or Individual Surety, Ltd. as the surety. Exhibit A, B, and C; see Footnote #21. The Commissioner may modify proposed Conclusions of Law that misinterpret or misapply the law to the established facts. Section 2-4-621(3), Mont. Code Ann.; Brady, 295 Mont. at 83, 983 P.2d at 297; Steer, Inc., 245 Mont. at 474, 803 P.2d at 603.

³³The Commissioner modified the Hearing Examiner's proposed Conclusion of Law #29, renumbered here as Conclusion of Law #24, by removing the reference to Hanson's financial

25. Shonto Surety is a successor in interest to Individual Surety and is liable for the actions of Individual Surety pursuant to § 27-1-501, Mont. Code Ann.

26. Pursuant to § 33-17-1001(1), Mont. Code Ann., the Commissioner may levy a civil penalty in accordance with § 33-1-317, Mont. Code Ann. when an insurance producer is found to be in violation of the Montana Insurance Code.

27. Pursuant to § 33-1-317, Mont. Code Ann., the Commissioner may impose an administrative fine against each Respondent not to exceed \$25,000.00 for each violation of the Montana Insurance Code, except that insurance producers may only be fined \$5,000.00 for each violation in addition to all other penalties imposed by the laws of Montana.

ORDER

From the foregoing Findings of Fact and Conclusions of Law, the Commissioner enters the following Order:

1. Respondents shall cease and desist from committing further violations of the Insurance Code.
2. The Temporary Cease and Desist Orders entered in the above-captioned matter shall become permanent.
3. Pursuant to §§ 33-17-1001 and 33-1-317, Mont. Code Ann., Respondent Shonto Surety, Inc., in all its various names and forms, such as Individual Surety and Individual Surety,

condition. As discussed previously, the surety bonds identify business entities Individual Surety and/or Individual Surety, Ltd. as the surety. Exhibit A, B, and C; see Footnote #21. The Commissioner may modify proposed Conclusions of Law that misinterpret or misapply the law to the established facts. Section 2-4-621(3), Mont. Code Ann.; Brady, 295 Mont. at 83, 983 P.2d at 297; Steer, Inc., 245 Mont. at 474, 803 P.2d at 603.

Ltd., shall pay a fine of \$25,000.00 for each of sixteen (16) violations of the Montana Insurance Code.³⁴

4. Pursuant to §§ 33-17-1001 and 33-1-317, Mont. Code Ann., the Respondent Robert Joe Hanson shall pay a fine of \$5,000.00 for each of eighteen (18) violations of the Montana Insurance Code.³⁵

NOTICE OF OPPORTUNITY FOR JUDICIAL REVIEW

Respondents are hereby notified of their right to request judicial review of this Order by filing a petition for judicial review within 30 days of service of this Order with the district court in Lewis and Clark County, Montana, as provided in §§ 2-4-702 and 33-1-711, Mont. Code Ann.

DATED this 22 day of February, 2007.

State Auditor and Commissioner of Insurance



JOHN M. MORRISON

³⁴Upon reviewing the complete record, the Commissioner determined that Shonto Surety, Inc. committed one violation of the Montana Insurance Code, § 33-1-101, Mont. Code Ann., *et seq.*, and that Individual Surety committed 15 violations of the Montana Insurance Code; specifically, there were five violations of law for each of the three bonds yielding a total of 15 violations. See the foregoing Conclusions of Law. Shonto Surety, Inc., as the successor in interest to Individual Surety, is liable for the violations of Individual Surety. The Commissioner has modified the Hearing Examiner's proposed Order accordingly. Section 2-4-621(3), Mont. Code Ann. (agency may modify the hearing examiner's proposed penalty after reviewing the complete record); Munn v. Board of Medical Examiners, 329 Mont. 401, 124 P.3d 1123 (2005).

³⁵Upon reviewing the complete record, the Commissioner determined that Respondent Hanson committed 18 violations of the Montana Insurance Code, § 33-1-101, Mont. Code Ann., *et seq.*; specifically, there were six violations of law for each of the three bonds yielding a total of 18 violations. See the foregoing Conclusions of Law. The Commissioner has modified the Hearing Examiner's proposed Order accordingly. Section 2-4-621(3), Mont. Code Ann. (agency may modify the hearing examiner's proposed penalty after reviewing the complete record); Munn v. Board of Medical Examiners, 329 Mont. 401, 124 P.3d 1123 (2005).

CERTIFICATE OF SERVICE

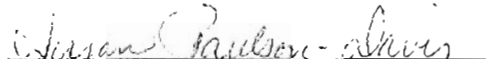
I hereby certify I served a copy of the foregoing Findings of Fact, Conclusions of Law, and Order and Notice of Opportunity for Judicial Review upon all parties of record on this 22nd day of February, 2007, by mailing or hand-delivering a copy thereof to:

Ms. Roberta Cross Guns
State Auditor's Office
840 Helena Avenue
Helena, MT 59601

Mr. Robert Joe Hanson
P.O. Box 9906
Albuquerque, NM 87119

Shonto Surety, Inc.
P.O. Box 9906
Albuquerque, NM 87119

Individual Surety
P.O. Box 9906
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State Auditor's Office